IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BELMONT HOMES PLAINTIFF

VS. No. 1:01CV311-D-D

CUNNINGHAM COMPANY; AND MARK CUNNINGHAM AND ELIZABETH CUNNINGHAM, INDIVIDUALLY DEFENDANTS

OPINION DENYING DEFENDANTS' MOTIONS TO DISMISS AND TO STAY PROCEEDINGS AND GRANTING PLAINTIFF'S MOTION TO COMPEL ARBITRATION

Presently before the court are the Defendants' motions to dismiss Plaintiff's fraud claim, to dismiss this cause of action for lack of personal jurisdiction, and to stay federal proceedings based on the Colorado River abstention doctrine. Also before the court is the Plaintiff's motion to compel this matter to arbitration pursuant to Section Four of the Federal Arbitration Act. In the motion, the Plaintiff also seeks to stay a state court proceeding brought by the Defendants against the Plaintiff in Dickson County, Tennessee.

Upon due consideration, the court finds that the Defendants' motions shall be denied. In accordance with the parties' agreement, the parties' claims shall be submitted to arbitration, and the proceedings currently pending in the Chancery Court of Dickson County, Tennessee, shall be stayed pending arbitration.

A. Factual and Procedural Background

The Plaintiff in this action, Belmont Homes ("Belmont"), is a division of Cavalier Enterprises, Inc., a Delaware corporation qualified to do business in Mississippi, that has a manufacturing facility in Belmont, Mississippi, where it produces manufactured housing. Defendant Cunningham Company ("Cunningham Co.") is a corporation organized under Tennessee law which is in the business of selling manufactured housing. Defendants Mark Cunningham and Elizabeth Cunningham

are adult residents of Tennessee. Mark Cunningham is the president of Cunningham Co.

The dispute before the court arises out of a manufacturer/retailer relationship between Belmont and Cunningham. Cunningham began purchasing manufactured homes from Belmont in 1993. On June 1, 1998, Belmont and Cunningham Co. entered into a Standard Retailer Agreement ("Retail Agreement"), which Mark Cunningham signed. It appears that the primary purpose of the Agreement was to declare that, at least at three locations in Tennessee where Cunningham sold homes, Cunningham would sell Belmont's products exclusively. The Retail Agreement states in the first paragraph that "[t]his agreement is made . . . by and between Belmont . . . whose manufacturing facilities are located in the State(s) of Mississippi . . . and Cunningham Co. . . . at the locations set forth on Schedule 1 hereto, which subject to changes to be reflected on additional Schedules to be attached hereto, are the only locations to which this agreement relates . . . ."[1] This agreement, among other things, contained an arbitration clause that states in part:

> 17. ARBITRATION AND WAIVER OF JURY TRIAL
> . . .
> [A]ny dispute, controversy, or claim of any kind or nature which has arisen or may arise between the parties, their successors, . . . (including any dispute, controversy or claim relating to the validity of this arbitration clause), whether arising out of past, present or future dealings between the parties, . . . shall be governed by the Federal Arbitration Act and shall be settled by arbitration in accordance with the Commercial Arbitration Rules . . . . Such arbitration proceedings shall be held at the principal place of business of the [sic] BELMONT or at such location as shall be designated by BELMONT . . . . Without limiting the generality of the foregoing, it is the intention of the parties to resolve by binding arbitration, as provided herein, all past, present, and future disputes, whether in tort, contract or otherwise, concerning or related to (i) the manufactured home, its

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[1]Cunningham asserts that the exclusive dealer agreement only applied to three locations in Tennessee where Cunningham sold homes. In the Addendum to the Retail Agreement dated the same day, it lists the following locations and doing business names of Cunningham Homes : (1) Cunningham Homes, 1911 Hwy. 46 S. Dickson, TN; (2) Ashland City Homes, 1114 N. Main St. Ashland City, TN; and (3) Springfield Homes, 3356 Hwy. 41 S. Springfield, TN. Cunningham contends that a newer, fourth location was not subject to this exclusive dealer arrangement. See Tennessee Complaint at 2-3.

> sale, warranty, set up, repair, . . . manufacture, financing, . . . (ii) the validity of this Agreement, and (iii) any other dealings, business or otherwise, between the parties . . . .

Retail Agreement at 7-8, ¶ 17. Directly below the Arbitration Agreement, Mark Cunningham signed as president for Cunningham Co. and again as guarantor.

About one year later, on or about July 30, 1999, Belmont and Cunningham Co. entered into a Loan & Security Agreement ("Loan Agreement"), where Belmont agreed to loan Cunningham Co. $150,000, to improve and develop the lots and offices where Cunningham sold the homes. The places listed in Exhibit A of the Loan Agreement where Cunningham does business included the previous three at (1) 1911 Hwy. 46 S. Dickson, TN; (2) 1114 N. Main St. Ashland City, TN; (3) 3356 Hwy. 41 S. Springfield, TN; and further included (4) Dickson Homes, 2005 Hwy. 46 S. Dickson, TN. The Loan Agreement has an arbitration clause similar to that appearing in the initial Retail Agreement. In what appears to be a fallback provision, the Loan Agreement contains an additional clause that provides:

> With respect to any dispute which for any reason is not arbitrated, . . . the Borrower [Cunningham] agrees that the Circuit Court of Tishomingo County, Mississippi, or, at Lender's option, the United States District Court for the Northern District of Mississippi, Eastern Division, shall have jurisdiction to hear and determine any claims or disputes between the Borrower and Lender, and the Borrower expressly submits and consents in advance to such jurisdiction in any action or suit commenced in any such court . . . .

Loan Agreement, §5.3.

That same day, Mark Cunningham also signed a Promissory Note ("Note") for the $150,000 and Elizabeth and Mark signed a Guaranty of Payment ("Guaranty") (Collectively, all three documents signed on July 30 will be referred to as the "Loan Documents"). The Guaranty also had an arbitration clause and fallback forum selection provision.

Since that time, the relationship between the parties worsened. Belmont asserts that Cunningham has breached the Retail Agreement and is in default on the Loan Agreement. Specifically, among other things, Belmont asserts that Cunningham ordered and was delivered one Model BM 391

Manufactured Home, and that Cunningham sold the home out of trust, is no longer in possession of the home, and failed to tender the purchase price to Belmont.

On or around March 5, 2001, Belmont instituted an arbitration proceeding. Belmont paid a filing fee to the American Arbitration Association and the matter was assigned a cause number. In response, the Defendants denied most of the allegations such as denying default and stating that Belmont's demand for the total amount of indebtedness has no valid basis in fact or law. It does not appear that Defendants contested personal jurisdiction in any way. An arbitrator was appointed for the matter and a preliminary hearing was scheduled by telephone to be held on July 3, 2001.

On July 2, 2001, the Defendants filed a verified complaint in the Chancery Court of Dickson County, Tennessee, against Belmont, alleging breach of contract, breach of fiduciary duty and requesting a jury trial.[2] The Defendants obtained a temporary restraining order from the Tennessee chancery court preventing the arbitration from going forward.

On August 15, 2001, Plaintiff Belmont filed this complaint in this court, against Cunningham Co., Mark and Elizabeth Cunningham, requesting judgment in the amount of $230,389.57, or in the alternative, to compel the matter back to arbitration. The complaint states that the "Defendants will suffer no harm in litigating this matter in this Court or alternatively by arbitrating this matter in Mississippi, as they have previously agreed." Federal Complaint, ¶ 55. Thereafter, Cunningham filed a motion to dismiss based on lack of personal jurisdiction, a motion to dismiss Belmont's fraud claim, and a motion

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[2]It appears that Cunningham's position is that there was an oral understanding that the Retail Agreement was to be terminated upon the signing of the Loan Documents. Among other things, in the state court complaint, Cunningham states that at the time of the filing of the Arbitration Demand, Cunningham only operates under the names Ashland City Homes and Dickson Homes and that it closed its Springfield lot and the Cunningham Homes lot in Dickson. It appears that Belmont disputes this though, as the affidavit of Rickey Tucker states that "as of February 28, 2001, Cunningham company had only closed its Springfield, Tennessee lot." (continued) Ricky Tucker affidavit at ¶ 10, Nov. 16, 2001.

to stay federal proceedings based on the Colorado River abstention doctrine while the Tennessee state case was pending.

On November 5, 2001, the Tennessee court heard oral arguments for Belmont's Motion to Stay Proceedings and Order Parties to Arbitration. On or about November, 9, the court issued an order that stated:

> [a]fter hearing oral argument and based on the entire record, the Court is of the opinion that Belmont's motion should be denied at the present time. However, the Court further orders that Belmont Homes is not precluded or estopped from petitioning the Court for arbitration at a later date, and, further, that the filing of any pleadings by Belmont Homes will not operate as a waiver of Belmont Homes' right to pursue arbitration in this matter in the future.

Tenn. Order, Nov. 9, 2001. Subsequently, Belmont filed a Motion for Interlocutory Appeal with the Tennessee court.

On or about November 13, Cunningham filed its reply brief in this court, arguing that the Tennessee Chancery Court's Order denying arbitration was a final judgment entitled to full faith and credit, that res judicata and/or collateral estoppel applied to the arbitration issue, and that the Rooker-Feldman doctrine and the Anti-Injunction Act prevent this court from compelling the matter to arbitration.

B. Discussion

1. Defendants' Motions to Dismiss and Stay Federal Proceedings

a. Personal Jurisdiction

Defendants initially argued that this court lacked personal jurisdiction because the Retail and Loan Agreements were "negotiated in Tennessee" and that Defendants were approached by Belmont's agents there. However, the affidavit of Michael Terrian, Division President of Belmont Homes, which is uncontested, states that Mark Cunningham traveled to Belmont, Mississippi, several times to inspect or order products and to meet with plant officials. Terrian stated that he personally met with Mark Cunningham in October 2000 in Belmont in regard to the Model BM 391 Manufactured Home, and

interest due Belmont.

Even assuming, for purposes of determining personal jurisdiction only, that the Retail Agreement was terminated upon the signing of the Loan Documents, or for some reason the arbitration agreements in the Loan Documents are not applicable, these Loan Documents contain a forum selection clause. See Tel-Com Mgt. Inc. v. Waveland Resort Inns, Inc., 782 So. 2d 149, 154-55 (Miss. 2001) (holding forum selection clause enforceable and not against Mississippi public policy). Personal jurisdiction can be waived and the Defendants have done so in this case. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473, 105 S.Ct. 2174, 2182 n. 14 (1985) (the personal jurisdiction requirement is a waiveable right, and there are a variety of legal arrangements, including agreeing in advance to submit controversies for resolution within a particular jurisdiction, by which a litigant may give express or implied consent to the personal jurisdiction of the court). Defendants argue that a Tennessee statute makes the forum selection clause void.[3] This statute is located in Part 2, entitled "Consumer Protection" of Chapter 11 of the Tennessee Code, which is entitled "Mechanics and Materialmen's Liens." The court is of the opinion that the statute is inapplicable in the present case as the Loan Agreement does not attempt to assert any kind of lien on real property in Tennessee. Furthermore, the fact that Defendant Cunningham Co. is a Corporation that has been doing business for several years also supports the conclusion that this statute in the "Consumer Protection" Part of the code is not applicable to the present case.

In any event, Defendants have sufficient contacts with the state of Mississippi to give this court

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[3]Defendants cite Tenn. Code Section 66-11-208 Real Estate improvement contracts -- Certain venue provisions prohibited, which states in relevant part:
(a) Except as otherwise provided in subsection (b), a provision in any contract, subcontract, or purchase order for the improvement of real property in this state is void and against public policy if it makes the contract, subcontract, or purchase order subject to the substantive laws of another state or mandates that the exclusive forum for any litigation, arbitration or other dispute resolution process is located in another state.

personal jurisdiction both under Mississippi's long arm statute, Miss. Code § 13-3-57, and the Constitution, even without the arbitration clauses and forum selection clauses. Defendants admit that over the years, Cunningham Co. has been one of the leading volume dealers for Belmont. Morever, this dispute arises out of a contract that is to be performed in part in Mississippi. The Note states that "[t]his Note is being executed and delivered in the State of Mississippi and all sums payable under this Note are payable in the State of Mississippi." Note at 3.

As such, the court finds that it has personal jurisdiction over the Defendants in the present case and the Defendants' motion to dismiss for lack of personal jurisdiction is denied.

b. Abstention based on Colorado River doctrine

The Defendants next argue that the court should abstain from hearing this action pursuant to the abstention doctrine of Colorado River. In Colorado River, a suit against some 1,000 water users, the Supreme Court held that, in certain limited and exceptional circumstances, federal courts may dismiss federal suits in favor of concurrent state court actions due to "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Colorado River, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L. Ed. 2d 483 (1976). The Court noted, however, that "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding . . . are considerably more limited than the circumstances appropriate for [other types of] abstention." Id. at 818. Further, the Court noted that the pendency of an action in state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction, and the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." Id. at 817.

Specifically, the Supreme Court, in clarifying Colorado River, has held that district courts may not abstain from hearing petitions to compel arbitration in deference to an underlying state-court lawsuit, absent compelling circumstances not present in this case. Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., 460 U.S. 1, 19-25, 103 S.Ct. 927, 938-41, 74 L. Ed. 2d 765 (1983); See also

Citifinancial, Inc. v. Lipkin, 143 F. Supp. 2d 657, 661-63 (N.D. Miss. 2000) (granting plaintiff's petition to compel arbitration and rejecting defendant's request to stay federal proceedings based on Colorado River while state court proceedings were pending).

Therefore the court is of the opinion that the pendency of an action in Tennessee state court is no bar to proceedings concerning the same matter in this federal court, since federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them.[4] As requested by Belmont, the court has jurisdiction to proceed to trial on the merits, or to compel arbitration.

c. Defendants' Motions to Dismiss Plaintiff's fraud claim

The court declines to discuss the Defendants' motion to dismiss Belmont's fraud claim as it is of the opinion that arbitration should be compelled. Therefore, it appears that whether Belmont has sufficiently alleged fraud would be a substantive matter to be decided in arbitration.

2. Effect of the Chancery Court of Tennessee's Order denying arbitration

Defendants argue that since the Tennessee court denied Belmont's motion to stay proceedings and compel the matter to arbitration, this court is precluded from compelling this matter to arbitration based on res judicata and/or collateral estoppel, full faith and credit, the Rooker -Feldman doctrine and the Anti-Injunction Act. Many of these arguments are intertwined, rather than distinct defenses.

a. The Anti-Injunction Act

First, this court has held, more than once, that a stay of state court proceedings was required to protect or effectuate this court's judgment and ordered that the controversy between the parties be submitted to arbitration. See American Heritage Life Ins. Co. v. Harmon, 147 F. Supp. 2d 511, 517 (N.D. Miss. 2001); Lipkin, 143 F. Supp. 2d at 663. In those cases the court rejected similar arguments that the Anti-Injunction Act, 22 U.S.C. § 2283, barred a stay of state court proceedings.

[4]The court recognizes that if a Tennessee court were to reach a final decision on the merits prior to this court, then it likely would be entitled preclusive effect based on full faith and credit.

Even though those cases involved ongoing state proceedings in a Mississippi state court, the result should not necessarily be different because the proceedings are in a state court of another state. In Harmon, the court stated "the policies embodied in the Federal Arbitration Act militate against having ongoing state proceedings at the very time those same claims are the subject of arbitration proceedings." Harmon, 147 F. Supp. 2d at 517. The court based its decision in part on the principles of "judicial economy, [and] the strong judicial policy favoring arbitration expressed by the Supreme Court." Id. However, as Defendants correctly point out, those cases did not involve state court proceedings where the state court had issued an order denying arbitration. Therefore, we must turn to Defendants' next arguments relating to preclusion of the Tennessee order.

b. The Rooker-Feldman doctrine

In a nutshell, the Rooker-Feldman doctrine holds that inferior federal courts do not have the power to modify or reverse state court judgments. Matter of Reitnauer, 152 F.3d 341, 343 (5th Cir. 1998) (applying the doctrine where "[t]he district court ... made apparent its displeasure with the manner in which the state court interpreted and applied state law [and] such displeasure formed the basis for its reversal of the bankruptcy court's order"). As the Fifth Circuit has noted, the Rooker-Feldman doctrine is "very close if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment." Gauthier v. Continental Diving Servs., Inc., 831 F.2d 559, 561 (5th Cir. 1987). Thus, the Fifth Circuit has not applied the Rooker-Feldman jurisdictional bar in cases where it would be inappropriate to require a federal court to give full faith and credit to a state court judgment. See id. (not applying the Rooker-Feldman doctrine where full faith and credit does not apply because the state court judgment would not be entitled to preclusive effect under state law). In other words, because the Fifth Circuit has interpreted the Rooker-Feldman doctrine as consistent with the Full Faith and Credit Act, the two arguments are not distinct. In re Lease Oil Antitrust Litigation, 200 F.3d 317, 319 n. 1. (5th Cir. 2000) (citations omitted).

c. Full Faith and Credit

The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, 28 U.S.C. § 1738, which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." In other words, to satisfy the full faith and credit requirement, a federal court must give the same deference to a state court judgment that a court of the rendering state would give it. Gauthier, 831 F.2d at 561. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F.2d 391 (5th Cir. Unit B. Feb. 1981) involved a somewhat similar factual scenario. While the case was in state court in Florida, the court denied Merrill Lynch's motion to compel arbitration and ordered a trial. Merrill Lynch filed a petition to compel arbitration in the United States District Court for the Southern District of Florida. In response, Haydu moved to dismiss the petition or to stay the federal action pending resolution of the state proceedings. On July 11, 1979, the district court granted Merrill Lynch's motion to compel arbitration. Haydu did not plead the July 2nd state court judgment (which denied arbitration) in district court until July 13, 1979, in a motion Haydu filed to reconsider the July 11th order. The District court denied the motion to reconsider on July 19, 1979.

The Fifth Circuit reversed, in part because of the district court's failure to address the effect of the state court's judgment denying arbitration. The Fifth Circuit directed the court to examine Florida law relating to res judicata and collateral estoppel to determine whether the state court's denial of a party's motion to compel arbitration was a final judgment. See also Doctor's Associates, Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995) (Second Circuit examined the preclusive effect of state court orders denying arbitration in three states and determined that based on Alabama law, the Alabama state court order denying arbitration was entitled to full faith and credit, but that based on Illinois and North Carolina law, those state court orders denying arbitration were not entitled to full faith and credit and the federal court could compel arbitration).

Therefore, the court's task is to examine Tennessee law to determine what deference and

preclusive effect, if any, courts in Tennessee would give the order denying arbitration.

d. Tennessee Law on Res Judicata and Collateral Estoppel

There are no decisions that directly address whether in Tennessee, an order denying arbitration is entitled to preclusive effect.

In Tennessee, res judicata and collateral estoppel apply "only if the prior judgment concludes the rights of the parties on the merits." Richardson v. Tennessee Board of Dentistry, 913 S.W.2d 446, 459 (1985) (citing A.L. Kornman Co. v. Metropolitan Gov't of Nashville & Davidson County, 216 Tenn. 205, 391 S.W.2d 633, 636 (1965)). One defending on the basis of res judicata or collateral estoppel must demonstrate that 1) the judgment in the prior case was final and concluded the rights of the party against whom the defense is asserted, and 2) both cases involve the same parties, the same cause of action, or identical issues. Richardson, 913 S.W.2d at 459 (citing Scales v. Scales, 564 S.W.2d 667, 670 (Tenn. App. 1977), cert. denied, (Tenn. 1978)).

In Tennessee, a judgment is final "when it decides and disposes of the whole merits of the case leaving nothing for the further judgment of the court." Richardson, 913 S.W.2d at 460 (citations omitted). The Richardson court gave the following examples: an order denying a motion for summary judgment, for example, is not a final judgment because the entire suit remains for disposition. Id. Likewise, the denial of a motion to dismiss does not end a lawsuit or constitute a final judgment. Id.

In general terms, the Tennessee Rules of Appellate Procedure recognize four possible "avenues" of appeal from a trial court's judgment: an appeal as of right from a "final" judgment under Rule 3(a), T.R.A.P.; an appeal as of right from a judgment designated by the trial court as a final judgment under Rule 54.02, Tenn.R.Civ.P.; an "interlocutory appeal by permission" as authorized by Rule 9, T.R.A.P.; and an "extraordinary appeal by permission" under Rule 10, T.R.A.P. Ridley v. Ridley, No. 03A01-9708-GS-00350, 1998 WL 8449 (Tenn. Ct. App. 1998). In the present case, Belmont has filed an interlocutory appeal with the Tennessee Court pursuant to T.R.A.P. 9. Thus, it seems that the Tennessee Chancery Court's order stating that "Belmont's motion should be denied at the present time"

is not a final order. By stating "[h]owever, the Court further orders that Belmont Homes is not precluded or estopped from petitioning the Court for arbitration at a later date, and, further, that the filing of any pleadings by Belmont Homes will not operate as a waiver of Belmont Homes' right to pursue arbitration in this matter in the future" the court clearly did not decide and dispose of the whole merits of the case leaving nothing for the further judgment of the court. In fact, the court did not even finally decide the arbitration issue. See also Frank Rudy Heirs Associates v. Sholodge, Inc., 967 S.W.2d 810, 813 (Tenn. Ct. App. 1997) (stating "[e]ven if we could give the chancellor's oral pronouncement from the bench [in previous case] the dignity of an order, it would be only an interlocutory order and, for res judicata or collateral estoppel to apply, the judgment in the prior case must have been final.") (citing Richardson, 913 S.W.2d 446).

Therefore the court is of the opinion that the order was not final, and courts in Tennessee would not give preclusive effect to the arbitration issue.

3. The Agreement's Arbitration Provision

Congress provided in the Federal Arbitration Act ("FAA") that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (1999). Section Four of the FAA specifically contemplates that parties, such as the Plaintiffs, that are aggrieved by another party's failure to arbitrate under a written agreement, may file an original petition in a United States District Court to compel that party to arbitrate their claims. 9 U.S.C. §4 (1999). In addition, the FAA expresses a strong national policy in favor of arbitration, and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Southland Corp. v. Keating, 465 U.S. 1, 10, 105 S.Ct. 852, 857, 79 L. Ed. 2d 1 (1983); Mouton v.Metropolitan Life Ins. Co., 147 F.3d 453, 456 (5th Cir. 1998).

The Fifth Circuit has directed that courts are to perform a two-step inquiry to determine

whether parties should be compelled to arbitrate a dispute. R.M. Perez & Assocs., Inc. v. Welch, 960 F.2d 534, 538 (5th Cir. 1992). First, the court must determine whether the parties agreed to arbitrate the dispute in question. This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement. Webb v. Investacorp, Inc., 89 F.3d 252, 257-58 (5th Cir. 1996). Once the court finds that the parties agreed to arbitrate, it must then consider whether any federal statute or policy renders the claims nonarbitrable. R.M. Perez, 960 F.2d at 538. In conjunction with this inquiry, a party seeking to avoid arbitration must allege and prove that the arbitration provision itself was a product of fraud or coercion; alternatively, that party can allege and prove that another ground exists at law or in equity that would allow the parties' contract or agreement to be revoked. Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 680-81 (5th Cir. 1976).

The Retail Agreement in this case applies to Cunningham's "locations set forth on Schedule 1 hereto, which subject to changes to be reflected on additional Schedules to be attached hereto, are the only locations to which this agreement relates." This Retail Agreement has a broad mandatory arbitration provision. It appears that Cunningham's argument is that the present dispute concerns other locations, or that for some reason the Retail Agreement was terminated, and therefore, the dispute is not subject to arbitration.

The Loan Agreement, signed approximately one year later, also has an arbitration provision that states:

> ARTICLE VI - ARBITRATION; WAIVER OF JURY TRIAL.
> Section 6.1 Any dispute, controversy or claim of any kind or nature between the parties arising out of or relating to this Loan Agreement or the Loan Documents or Lender's actions with respect to the Collateral or in any way relating to the relationships between Lender and Borrower, . . . shall at the request of either party be determined by arbitration. . . . The arbitration shall be held at the principal place of business of Lender, Belmont, Mississippi . . . .

Loan Agreement, Article VI, § 6.1. The Guaranty has what appears to be an identical provision.

The fact these contracts contain a fallback forum selection clause does not mean the arbitration provision is not a mandatory one. Arbitration shall occur "at the request of either party."
In the present case, there is a valid agreement to arbitrate between the parties; and the dispute in question falls within the scope of that arbitration agreement.

Last, similar to the arguments regarding the forum selection clauses above, the Defendants argue that the arbitration agreements are invalid because of Tenn. Code section 66-11-208. Again, the court is of the opinion that said statute does not apply in the present context of a loan where the borrower intends to turn around and use some of the proceeds to improve real property. In any event, the Fifth Circuit has stated that the "FAA preempts other state laws that preclude parties from enforcing arbitration agreements." OPE Int'l LP v. Chet Morrison Contractors, 258 F.3d 443, 447 (5th Cir. 2001). The court noted that "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." OPE Int'l, 258 F.3d at 446.

As such, the court is of the opinion that Defendants' arguments are without merit. It appears that the dispute is covered by the arbitration agreement, and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

C. Conclusion

For the above stated reasons, the Plaintiff's motion to compel arbitration is granted, the parties' claims are referred to arbitration, and the Defendants' pending suit in state court is stayed. Further, the Defendants' motions to dismiss and for abstention are denied. Finally, the court finds that this cause should be dismissed without prejudice. The Fifth Circuit has held that Section 3 of the Federal Arbitration Act (which provides that the court "shall . . . stay the trial of the action") was not intended to limit dismissal of a case in the proper circumstances and that if all of the issues raised in the district court are arbitrable, dismissal of the case is proper. See Alford v. Dean Witter Reynolds, Inc., 975 F.2d

1161, 1164 (5th Cir. 1992) (holding that retaining jurisdiction and staying "serve[s] no purpose" when all issues are arbitrable). As was the case in Alford, all of the claims in this case are arbitrable. As such, the parties' claims shall be dismissed without prejudice.

A separate order in accordance with this opinion shall issue this day.

This the ____day of December 2001.

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Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BELMONT HOMES PLAINTIFF

VS. No. 1:01CV311-D-D

CUNNINGHAM COMPANY; AND MARK CUNNINGHAM AND ELIZABETH CUNNINGHAM, INDIVIDUALLY DEFENDANTS

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS AND TO STAY PROCEEDINGS AND GRANTING PLAINTIFF'S MOTION TO COMPEL ARBITRATION

Pursuant to an opinion issued this day, it is hereby ORDERED that

(1) the Defendants' motion to dismiss the fraud claim (docket entry 6) is DENIED;

(2) the Defendants' motion to dismiss for lack of personal jurisdiction (docket entry 7) is DENIED;

(3) the Defendants' motion for abstention (docket entry 8) is DENIED;

(4) the Plaintiff's motion seeking an order compelling arbitration (docket entry 16) is GRANTED;

(5) the parties' claims shall be submitted to arbitration, in accordance with the parties' arbitration agreement;

(6) all proceedings in the case of Cunningham Company v. Belmont Homes, No. 7308-01, Chancery Court of Dickson County, Tennessee at Charlotte, are STAYED; and

(7) this case is DISMISSED WITHOUT PREJUDICE.

SO ORDERED, this the ____day of December 2001.

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Chief Judge